

**STATE OF TENNESSEE  
OFFICE OF THE ATTORNEY GENERAL**

**December 22, 2016**

**Opinion No. 16-49**

**Prohibition on Telephone Conversations, Photography, and Video or Audio Recordings  
Inside a Polling Place**

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**Question 1**

Tennessee Code Annotated § 2-7-142 permits voters to use mobile electronic devices inside polling places to assist in making election decisions, but prohibits use of the devices for telephone conversations, photography, and video or audio recordings. Does this prohibition violate the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and article I, section 19 of the Tennessee Constitution?

**Opinion 1**

No. The regulations in Tenn. Code Ann. § 2-7-142 do not violate the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and article I, section 19 of the Tennessee Constitution. The interior of a polling place is a nonpublic forum. The government may, without violating either the U.S. or the Tennessee Constitution, regulate speech and expressive conduct in a nonpublic forum as long as the regulation is reasonable in light of that forum's purpose. The prohibitions in Tenn. Code Ann. § 2-7-142 are content-neutral regulations that are reasonable in light of the purposes of a polling place, which include (1) ensuring privacy of the ballot, speed and efficiency of the voting process, and integrity of the election, and (2) preventing disruption and distraction for voters, voter intimidation, and interference and fraud in the balloting process.

**ANALYSIS**

Both the United States Constitution and the Tennessee Constitution protect citizens' rights to freedom of speech. *See* U.S. Const. amend I; Tenn. Const. art. I, § 19. But neither the federal First Amendment nor the state freedom of speech clause provides an absolute guarantee; both are subject to reasonable regulation. *See H & L Messengers, Inc., v. Brentwood*, 577 S.W.2d 444, 449 (Tenn. 1979). In general, the government may regulate speech to serve an important public interest, but the restrictions must be limited to those necessary to further that interest. *Id.*

A state has the power to regulate conduct in and around the polls. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Election regulations have always "battle[d] against two evils: voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992). The solution to these problems is a secret ballot. *Id.* Ballot secrecy is "one of the fundamental civil liberties upon which a democracy must rely most heavily in order for it to survive." *Smith v. Dunn*, 381 F.Supp. 822, 825 (M.D. Tenn. 1974) (three-judge panel). "[A] secret ballot [is] secured in part by a

restricted zone around the voting compartments.” *Burson*, 504 U.S. at 206. These go hand in hand: “The only way to preserve the secrecy of the ballot is to limit access to the area around the voter.” *Id.* at 207-08. And Tennessee has long protected the secret ballot in this manner. *See, e.g.*, Tenn. Code Ann. § 2-9-101 (ensuring “absolute secrecy” of voting machines); Tenn. Code Ann. § 2-3-108 (ensuring secrecy of paper ballots). Protecting election integrity is a compelling government interest—the strongest interest a state may possess. *See Burson*, 504 U.S. at 208.

Tennessee Code Annotated § 2-7-142 provides:

- (a) A county election commission shall not prohibit a voter from using a mobile electronic or communication device at a polling place for informational purposes to assist the voter in making election decisions. A county election commission may require that any mobile electronic or communication device be silenced while in use at the polling place.
- (b) Any voter using a mobile electronic or communication device as allowed in subsection (a) shall be prohibited from using the device for telephone conversations, recording, or taking photographs or videos while inside the polling place.

### **Regulation of Protected Speech**

Determining whether Tenn. Code Ann. § 2-7-142 violates the right to free speech begins with a preliminary question: Does the statute regulate protected speech? The answer is yes.

It is a matter of public knowledge that this opinion request arises in the context of the 2016 presidential election and the recurring act of voters taking “ballot selfies”—photographs of themselves posing with completed ballots—and sharing those pictures on the internet and social media.<sup>1</sup> Taking and sharing photographs over the internet are forms of protected speech. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) (“This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue.”). Thus, by prohibiting voters inside a polling place from taking selfies, Tenn. Code Ann. § 2-7-142 regulates a form of protected speech or protected expressive conduct.

Because the statute regulates protected speech, it is subject to constitutional scrutiny. The level of scrutiny applied to the statute turns on whether the forum being regulated is public or not, and, in public forums, whether the regulation is content-based or content-neutral. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 790-91 (1989). For the reasons explained below, Tenn.

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<sup>1</sup> *See, e.g.*, Jody Callahan, *Lawmaker wants to make Tenn. safe for ballot selfies*, USA TODAY, (Nov. 3, 2016, 11:50 PM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/11/03/ballot-selfies-law-tennessee/93272538/> (last visited November 29, 2016).

Code Ann. § 2-7-142 is constitutional because it is a reasonable, content-neutral<sup>2</sup> regulation of speech or conduct in a nonpublic forum.

### **Nonpublic v. Public Forum**

The standards for evaluating the constitutionality of limitations on the right of free speech “differ depending on the character of the property at issue.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983). The property may be a “public forum” or it may be a “nonpublic forum.” Public forums include traditional public forums, such as places that “by government fiat have been devoted to assembly and debate.” *Id.* at 45. Public forums also include property that the government opens for public expression in certain circumstances. *Id.* at 45-46. Regulation of protected speech that occurs in a public forum is subject to “strict scrutiny” if the regulation is based on the content of the speech, but, if the regulation is content-neutral, it is reviewed under intermediate scrutiny. *Id.*

Nonpublic forums are “[p]ublic property which is not by tradition or designation a forum for public communication,” and regulating speech on such property “is governed by different standards.” *Perry* 460 at 46. “In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable . . . .” *Id.* Put another way, regulation of speech in a nonpublic forum will pass constitutional muster as long as the regulation is reasonably related to a legitimate government purpose. *U. S. v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion).

The regulations in Tenn. Code Ann. § 2-7-142 govern conduct “while inside the polling place.” A “polling place itself is a nonpublic forum” for free speech purposes. *Minn. Majority v. Mansky*, 708 F.3d 1051, 1057 (8th Cir. 2013), cert. den. 134 S. Ct. 824 (U.S. 2013). The interior of a polling place is, likewise, a nonpublic forum; it “is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter’s communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space.” *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001) (citing *Burson v. Freeman*, 504 U.S. 191, 201-06 (1992)), cert. denied, 532 U.S. 1039 (2001); see also *Silberberg v. Bd. of Elections*, 16-cv-8336, 2016 WL 6537691, at \*4 (S.D.N.Y. Nov. 3, 2016) (finding that the interior of a polling place is likely not a public forum, and accordingly denying a request for a preliminary injunction from voters seeking to take ballot selfies).

### **Reasonableness of the Regulation**

Because a polling place is not a public forum, any regulation on speech within that forum will be constitutional as long as it reasonably relates to a legitimate government interest. See *Perry*, 460 U.S. at 46. The reasonableness standard is not a particularly high hurdle; a regulation “need not be the most reasonable or the only reasonable limitation.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Ultimately, a speech restriction is reasonable

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<sup>2</sup> The statute makes no reference to any category of speech or to specific content whatsoever, but generally prohibits all telephone conversations, audio and visual recordings, and photos inside a polling place regardless of purpose, topic, or content. See *Ward*, 491 U.S. at 791.

“when it is consistent with the [government’s] legitimate interest in preserv[ing] the property . . . for the use to which it is lawfully dedicated.” *ISKCON v. Lee*, 505 U.S. 672, 688 (1992) (O’Connor, J., concurring) (brackets in original) (internal quotation marks and citations omitted).

To determine the reasonableness of a particular regulation, a court must conduct a balancing test that weighs such factors as the forum’s typical use, the particular risks associated with the speech or activity at issue, and the proffered rationale for the restriction. Here, several government interests are furthered by Tenn. Code Ann. § 2-7-142, including: protecting voter privacy and ballot secrecy, preventing voter fraud and intimidation, and ensuring that voting occurs efficiently and safely, without delay, distraction, or disruption.

First, Tennessee has an interest in “preventing voter intimidation and election fraud” through the secret ballot. *Burson*, 504 U.S. at 206. The regulations imposed by Tenn. Code Ann. § 2-7-142(b) are reasonably related to protecting ballot secrecy. By prohibiting recordings inside the polling place, Tenn. Code Ann. § 2-7-142(b) not only protects against accidental violations of a voter’s privacy, such as a photograph capturing someone else’s information, but also prevents attempts to resurrect and modernize voter intimidation tactics. *See Burson*, 504 U.S. at 201 n.7 (explaining that groups used to watch members mark and deposit ballots); *Silberberg*, 2016 WL 6537691, at \*5 (“Without the statute, employers, unions, and religious groups could encourage their members to upload images of their marked ballots to a single location to prove their commitment to the designated candidate.”).

Second, the statute is reasonably related to preventing distraction, disruption, and delay in the voting process—a stated goal of the legislation. *See* 2015 Tenn. Pub. Acts, ch. 315; *see also* Tenn. Code Ann. § 2-7-118 (limiting voters to no more than 5 minutes inside a voting booth). Taking a ballot selfie adds enough delay on its own, even without multiplying that delay by every voter who might take one. *See Crookston v. Johnson*, No. 16-2490, 2016 WL 6311623, at \*3 (6th Cir. Oct. 28, 2016).<sup>3</sup> Nor is it hard to imagine various ripple-effects from a ballot selfie causing an even greater delay. Consider: Voter A takes a selfie. Voter B, worried that the selfie captured her ballot, asks a poll worker to inspect the photograph. Now the poll worker must examine the photograph to determine whether it violates Voter B’s rights. This alone delays and disrupts voting, and it could only worsen if Voter A then retakes the selfie. The disruption could also distract other voters, causing more delay, much like a traffic jam caused by rubbernecking.

In sum, the regulations in Tenn. Code Ann. § 2-7-142 do not violate the right to freedom of speech guaranteed by the First Amendment to the United States Constitution and article I, section 19 of the Tennessee Constitution. The interior of a polling place is a nonpublic forum. The government may, without violating either the U.S. or the Tennessee Constitution, regulate speech and expressive conduct in a nonpublic forum as long as the regulation is reasonable in light of that forum’s purpose. The prohibitions in Tenn. Code Ann. § 2-7-142 are content-neutral regulations that are reasonable in light of the purposes of a polling place, which include (1)

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<sup>3</sup> In *Crookston*, the Sixth Circuit addressed a Michigan law that, like Tennessee’s, has the effect of prohibiting ballot selfies. The district court issued a preliminary injunction that would have allowed voters to take ballot pictures. The Sixth Circuit stayed that preliminary injunction, keeping Michigan’s prohibition in place. Since the case was only in the preliminary injunction stage of proceedings, the Sixth Circuit did not definitively resolve the merits of the case, but it did find the plaintiff’s “likelihood of success” on the merits to be very low. *See Crookston*, 2016 WL 6311623.

ensuring privacy of the ballot, speed and efficiency of the voting process, and integrity of the election, and (2) preventing disruption and distraction for voters, voter intimidation, and interference and fraud in the balloting process.

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